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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 807

GIANT TIGER DRUGS, INC.,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

ON APPEAL FROM THE FINAL ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING AN APPEAL OF THE JUDGMENT OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, STATE OF OHIO, AFFIRMING THE CONVICTION OF THE APPELLANT (PURSUANT TO 28 U. S. C. SECTION 1257 (2)).

JURISDICTIONAL STATEMENT.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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JURISDICTIONAL STATEMENT.

A. OPINIONS DELIVERED IN COURT BELOW.

The opinion of the Municipal Court of the City of Euclid, State of Ohio, is unreported, and is annexed hereto Appendix A. The conviction was affirmed by the Court of Appeals for the County of Cuyahoga, State of Ohio, in an unreported decision, without opinion, the Journal Entry in said Court being annexed hereto as Appendix B. The Supreme Court of the State of Ohio dismissed an appeal from the decision of the Court of Appeals of Cuyahoga County, Ohio, for the reason that no debatable constitutional question was involved. The decision is reported in Volume 171 O. S. at page 294. This is a final order from the highest Court in the State of Ohio and is annexed hereto as Appendix C.

B. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

Appellant was convicted of a violation of Ohio Revised Code Section 3773.24, a so-called Sunday Closing Law. The Appellant seeks a review of the conviction by the Municipal Court of Euclid, which was affirmed by the judgment of the Court of Appeals for Cuyahoga County, Ohio, which said judgment was sustained by a final order of the Supreme Court of Ohio, dismissing the appeal as of right. Notice of Appeal was filed in the Supreme Court of the State of Ohio.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (2), the appeal being from a decision "involving the validity of a statute of a State upon the grounds that same is repugnant to the Constitution of the United States." *Everson v. Bd. of Education*, 330 U. S. 1 (1947), *Winters v. New York*, 333 U. S. 507 (1948), *McGowan v. Maryland*, Supreme Court of the United States, October Term, 1960, No. 8.

C. STATUTE AND CRIMINAL PENALTIES INVOLVED.

Revised Code Section 3773.24, as amended by the Ohio Legislature in 1959 reads in full as follows:

> "No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as

the sabbath, and abstain thereon from doing things prohibited on Sunday.

"This section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

Revised Code Section 3773.99 (Q) provides as follows:

"Whoever violates Section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days."

D. QUESTIONS PRESENTED.

The following questions are presented:

1. Whether Ohio Revised Code Section 3773.24 and the provisions thereof are ambiguous, unreasonable, arbitrary and discriminatory in the classification of the individual's businesses and commodities affected, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. Whether Ohio Revised Code Section 3773.24, which requires the closing of a legitimate business on

Sunday and which prohibits a person from working on Sunday, is such an unlawful limitation on the right to contract and to use one's property as to violate the Fourteenth Amendment to the United States Constitution.

3. Whether a state law, such as the Ohio "Sunday Closing Law," barring labor, business or work on Sunday, violates the clauses of the First Amendment prohibiting an establishment of religion and guaranteeing its free exercise, and violates the equal protection clause of the Fourteenth Amendment.

E. STATEMENT OF THE CASE.

On September 14, 1959, a warrant was sworn to and arrest made of Giant Tiger Drugs, Inc., charging that on the 6th day of September, 1959, being the first day of the week, commonly called Sunday, did unlawfully suffer or permit a building located at 22480 Shore Center Drive, Euclid, Ohio, to be open for transaction of business in violation of Section 3773.24 of the Revised Code of Ohio.

The item purchased and offered in evidence was a small lawn mower, price $18.88 (Record 11).

The store referred to in the warrant is away from the downtown district and caters largely to neighborhood trade.

During the course of the trial and at the conclusion thereof, motions were made by the Appellant for dismissal on the grounds that the statute was in violation of both the First and Fourteenth Amendments to the Constitution of the United States. These motions were overruled (Record page 6). The exceptions were noted and the Trial Court found the Appellant guilty and a fine imposed. On the appeal to the Court of Appeals and to the Supreme Court of Ohio, assignments of error and briefs were filed in the respective courts, raising the constitutionality of the

statute as being in conflict with the First and Fourteenth Amendments to the Constitution of the United States.

F. THE QUESTIONS PRESENTED ARE SUBSTANTIAL, WERE WRONGLY DECIDED BELOW AND ARE OF GREAT PUBLIC IMPORTANCE.

1. The Statute is Ambiguous, Unreasonable, Arbitrary and Discriminatory in Classifications.

There are numerous exceptions as the Court will observe in the Act, Paragraph (A), By direction of the Act, it is provided that this section "shall not apply to traveling or the providing of services and commodities incidental thereto." The term "traveling" and the providing of services and commodities thereto would embrace and include trains, airplanes, buses, bicycles, automobiles, motorcycles, boats and automobile trailers. The commodities incidental to all these items would be an endless list, which would and should include garages for storage and repairs, gasoline service stations, oiling and washing of automobiles, bicycle stores for the sale of bicycles and repair thereof, as well as motorcycles, the sale of traveling bags and luggage and other traveling accessories, which could well embrace and include some article of apparel, an auto trailer used for traveling would require furniture, electrical equipment, cooking utensils and food, cooked and uncooked, as well as fruits and vegetables. It would, in my judgment, include as well the sale of automobiles by dealers, both new and used, as these are commodities incidental to traveling. The list is an endless one and I have hardly scratched the surface.

Taking exception (B) of the Law, namely "recreation, sports, amusements, entertainment or exhibitions or the providing of services and commodities incidental thereto," this would include ground keepers, greens keepers, repair

of facilities, cutting of grass, sale of tickets, caddies, sale of all types of equipment, and all of the labor used for skating, fishing, baseball, football, race tracks, radio stations and television studios, boating, theatres, moving picture houses, prize fights, wrestling matches, saloons, night clubs, burlesque theatres, bowling, hunting and tennis. In addition thereto, all of the commodities incidental to any of the above, and I have by no means included all of the items which would be proper under this section, would be appropriate items of business, which would include and embrace persons rendering common labor to participants and then to the shop keepers, who would sell all of the commodities used "in connection therewith."

The next exception, to-wit "Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto." It is to be noted at this point that the Act was passed and declared to be an "emergency measure" necessary for the immediate preservation of public peace, health and safety, and that the reason for such necessity lies in the fact that this would insure the Sunday operation of the state and county fairs. Yet, Paragraph (C) of the exception makes provision for independent fairs, which could well be an exhibition and sale of commodities, conceived, maintained and operated by individuals having no connection whatsoever with either the State of Ohio or the county. Now the operation of fairs, both county and state and independent, involves much common labor and the sale of many different commodities. As pointed out, what makes it necessary or desirable that fairs operate on Sunday and sell all nature of commodities when no other businessman is permitted so to do elsewhere in his own place of business?

The last exception, namely Paragraph (D), provides for "the operation of publicly owned places of entertain-

ment, recreation or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto." This paragraph, then, makes provision for common labor in all publicly owned places of entertainment, etc. and the providing of services and commodities incidental thereto, which shows that the law under consideration is decidedly discriminatory.

I have gone to some length to enumerate the number of items that could come under the exceptions and the number of commodities that would, by the language of the law, be properly sold and provided, to point up the objection which we find to this law to the effect that by the various exceptions, the Legislature has created a condition which indeed constitutes class legislation, is discriminatory and incapable of clear construction. We are charged in this case with the sale of a small lawn mower.

Every one of the exceptions, from (A) to (D) included, provide for the sale of commodities incidental thereto and in any instance, and as to any of the commodities therein treated, I believe that a small lawn mower is a commodity which could be "incidental thereto."

The law as drawn will create an avalanche of prosecutions for the confusion in determination by way of interpretations, which makes it impossible to arrive at a proper conclusion.

Farmers, in the depression, discovered they could lure passing traffic with a vegetable stand. Their wives added jellies, knitgoods, hooked rugs. Sunday was the day America took to the road!

Who objects to Sunday sales? The answer is obvious, that the pressure comes from certain groups who have been constantly agitating for its enforcement because of their own selfish interests. By virtue of the numerous changes which have thus far been engrafted on the original

law, due to the arbitrary exertions of different pressure groups, the statutes have become riddled with inconsistencies and unexplainable classifications. Consequently, the laws are enforced discriminately and essentially have become a weapon in an economic struggle.

2. The Statute Is in Violation of the Fourteenth Amendment to the Constitution of the United States as Being an Unlawful Limitation on the Right to Contract and to Use One's Property.

An examination of the origin of Sunday laws establishes that their function is to compel observance of the Christian holy day. Both the majority and minority opinions below acknowledge that the Massachusetts statute originally had religious motivation and purpose. *Crown Kosher Super Market v. Raymond P. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959) The statute of 1653 was intended "to compel a seemly observance" of the Sabbath celebrated by the dominant Christian sect. The preamble to the early forms of the statute made its religious intent obvious.

The Supreme Court of New Jersey describes Sunday legislation as "the product of Church-State Unions. The American colonists brought with them the tradition of the state established religion * * * and perhaps solely for sectarian reasons the authority of colonial government was exerted to support the Christian Sabbath." *Two Guys From Harrison-Allentown, Inc. v. Furman*, 32 New Jersey 199, 205 (1960).

The New York Court of Appeals also recognized that Sunday Laws "may be said to have had a religious origin." *People v. Friedman*, 302 New York, 75 (1950).

The Superior Court of Pennsylvania, in *Commonwealth v. Hoover*, 25 Pa. Super. Ct. 133 (1904), in tracing

the origin and development of Sunday Laws, said: "Sunday legislation is more than fifteen centuries old, and the historic argument is of value in construing existing law." "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of Middle Age legislation of the Holy Roman Empire. The first Sunday law, the edict of the Emperor Constantine, was the product of that pagan conception developed by the Romans which made religion a part of the state. During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish Theocracy."

The highest court of Massachusetts described Sunday statutes in the same way. "Our Puritan ancestors intended that the day (Sunday) should be not merely a day of rest from labor but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares of amusements. They saw fit to enforce the observation of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force without any substantial modification to the present time." *Davis v. Somerville*, 128 Mass. 594 (1880).

An examination of the Sunday laws currently on the statute books of the various states, and particularly that of the State of Ohio, shows beyond doubt that the original motivation and intent of such legislation still continues. The fact that Revised Code Section 3773.24, adopted by the Ohio Legislature, the Act in question in this cause, states that "This section does not apply to work of necessity or charity and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath and abstain thereon from doing things prohibited on Sunday," proves its religious basis.

This treatment, by the Ohio Legislature, and the use of the word "Sabbath," clearly concedes the law was de-

signed to cover and to carry forward the observance of the Christian Sabbath, to-wit, Sunday.

Sunday Laws violate the religious freedom of Jews, Seventh Day Adventists, Seventh Day Baptists and all others who do not observe Sunday as their holy day. The present Sunday Laws require religious non-conformists to manifest a pattern of conduct inconsistent with their own religious commitment and consistent only with the religious beliefs of the majority. By prohibiting business and shopping on Sunday, such statutes impose an economic penalty upon those who do not observe Sunday as their Sabbath.

Therefore, we contend that equal protection of the laws, as provided in the Fourteenth Amendment, is denied to those who are not willing to observe Sunday as their Sabbath.

The "establishment of religion" clause has been defined by this Court in three recent decision: *Everson vs. Board of Education*, 330 U. S. 1 (1947); *McCollum vs. Board of Education*, 333 U. S. 203 (1948); and *Zorach vs. Clausen*, 343 U. S. 306 (1952). In the *Everson* case, the court said "'Neither a State nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion." In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." 330 U. S. at 15-16; see also 41, 52, 53, 59, 60.

In *McCollum*, this definition of the establishment clause was the basis for a determination that a released time program in the Public Schools of Champaign, Illinois,

violated the First Amendment. Under that program, children attending Public Schools were released one hour during each week to receive religious instruction in the school buildings from teachers provided and paid by religious groups. In an eight to one decision, this Court struck down that decision, quoting with approval the definition of establishment from the *Everson* case 330 U. S. at 210-211.

In *Zorach vs. Clausen*, *supra*, this Court reaffirmed the principles enunciated in the previous two cases.

This Court has never squarely decided the issue raised in this case. Sunday Laws have been discussed in three previous decisions, to-wit, the case of *Soon Hing vs. Chief of Police*, 113 U. S. 703 (1885), the case of *Hennington vs. Georgia*, 163 U. S. 299 (1896) and the case of *Petit vs. Minnesota*, 177 U. S. 164 (1900).

Aside from the fact that Soon Hing did not decide the validity of Sunday Laws, it is doubtful whether this Court would rule the same way if faced with the case today, especially in view of the fact that the ordinance attacked was one of many discriminatory measures then aimed at Chinese. The Court's attitude in these three cases certainly was understandable, considering the time of the decision. In those days there were few laws protecting labor. The seven-day work week and the sun-up to sun-down work day were all too common-place.

This Court in *Niemotko vs. Maryland*, 340 U. S. 268 (1951) held that the Fourteenth Amendment clearly prohibits the State and all its political subdivisions from discriminating against any person or group of persons because of their religious conviction or affiliation. In that case, Jehovah Witnesses were denied protection equal to that provided for the dominant religions.

We therefore contend that while a statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week, it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. It is possible that the legislature under its police power may require each individual to desist from work at least one day per week, but it may not constitutionally designate the particular day of the week for universal rest.

3. The Statute Is in Violation of the First Amendment, Prohibiting an Establishment of Religion and Guaranteeing Its Free Exercise and Violates the Equal Protection of the Fourteenth Amendment by Barring Labor, Business or Work on Sundays.

The Sunday Laws here in issue do not in fact require anyone to rest on Sunday. They merely require some trades, businesses and occupations not to operate on that day. They impose no obligation of rest on those businesses—almost too numerous to count—that are permitted to operate on Sunday and nothing in the Sunday Laws prohibits persons from engaging in a forbidden business for six days of the week and in a permitted business on Sunday. Such a person could engage in business seven days each week without any rest and yet would not violate the statute here in issue.

The businesses permitted by the statute of Ohio undoubtedly employs thousands of persons in the State. As far as these statutes are concerned, these persons may work seven days a week. Is this law, which has been labeled for the health and welfare, truly for this purpose, or is it not true that the predominent purpose of the statute is not to ensure rest but to prevent defilement of the Sunday Sabbath? It is aimed not at persons but at businesses.

They seek to prevent secularization of the Lord's Day. If that were not so, why select the Lord's Day as the one day of the week which persons shall rest. So far as health is concerned, it makes no difference whether a person rests every Monday or every Sunday. Why should not each business owner decide for himself the day of the week in which he will refrain from operations? Business are conducted in the open and there would be no practical difficulties in enforcing such a law. In Great Britain and in some dozen or so states in this country, persons who observe a day other than Sunday as their day of rest are permitted to operate their businesses on Sunday. *Pfeffer, Church, State and Freedom*, page 230. These exemptions have been on the law books for many years and there is no evidence that enforcement has been impracticable anywhere.

All states have enacted laws relating to hours of work, most of these apply to women and minors. Many of them also limit the number of days per week in which they may work, ordinarily not more than six. Others go further and forbid such work during the night. *Radice vs. New York*, 264 U. S. 292 (1923). All of these laws contain provisions for the enforcement and there is no reason to believe that they have not been effective or that the investigating and inspection arms of the enforcement agencies cannot properly and adequately compel a "one day of rest in seven" law.

If, therefore, for many years there have existed in the statute books of this country laws limiting hours of work, exempting from Sunday Laws observers of other Sabbaths and "one day of rest in seven" laws, which from all available evidence are operating satisfactorily and being properly enforced, there is, therefore, no need for a law compelling universal rest on Sundays and depriving the indi-

vidual from the right to choose for himself the day upon which he will desist from labor.

The existence of these statutes with their enforcement provisions and penalties clearly demonstrates that there is no need for "Sunday Laws" to protect the employees by insuring them a "day of rest" or "all persons from the physical and moral debasement which comes from uninterrupted labor."

In the Sunday Law cases of *Commonwealth vs. Cavalerro and Levenston* appearing in the *Legal Intelligencer* April 22, 1960, Judge Alexander stated "Many states * * * have one day in seven rest laws * * * and I know no problem in connection with their enforcement or with the enforcement of the labor laws referred to. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday Laws is common knowledge and tends to bring law enforcement generally into disrepute. Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used and mere ease of enforcing a more restrictive alternative will not sustain it."

Since "one day of rest in seven" law is a reasonable, non-discriminatory alternative to Sunday Laws, we contend that the Sunday Laws should be declared unconstitutional.

CONCLUSION.

If the desired legislative purpose is to provide compulsory one day rest in seven, then the legislature in choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interfers with the constitutional rights of the individual consistent with effective enforcement. For, if effective enforcement is absent, the goal is not achieved.

If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week and to permit the individuals concerned, by contrast, to determine which day of the week shall constitute the day of of rest.

The old Supreme Court cases holding Sunday Laws based on the police power of the states to pick Sunday as the universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: All these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship, and also the time thereof, so long as it does not interfere with the rights of others to enjoy their days of rest and worship in the manner and at the time they see fit. The changed habits of the people and the growth of towns and cities in contrast to the essentially village conditions of earlier centuries, the development of motor transport and above all the effect of two World Wars have made the state regulation of Sunday almost an anachronism.

In view of the previous action of this Court in noting probable jurisdiction and assigning for hearing several cases which raise constitutional issues similar to those presented by this appeal, it is respectfully submitted that this Court should note probable jurisdiction in this matter and set this case for hearing.

Respectfully submitted,

H. H. FELSMAN,

Attorney for Appellant.

APPENDIX A.

COURT'S FINDING AND FINE.

BURNS, J.: Parties in Court, Trial had. Defendant found guilty. Fined $25.00 and costs.

APPENDIX B.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

This cause came to be heard upon notice of appeal, transcript of the original docket and journal entries, bill of exceptions, original papers and assignment of errors from the Municipal Court of Euclid, Ohio. The Court finds, however, that there were reasonable grounds for this appeal.

It is therefore ordered and adjudged by the Court that the judgment aforesaid be affirmed and that the Appellee recover from the Appellant its costs herein expended.

It is further ordered that a special mandate be sent to the Municipal Court of Euclid to carry its judgment into effect.

To all of which the Appellant excepts.

APPENDIX C.

FINAL ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, as upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same is sua sponte dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $_____.

ORDERED, That a special mandate be sent to the Municipal Court of the City of Euclid, Ohio, to carry this judgment into execution.

ORDERED, That a copy of this entry be certified to the Court of Appeals of Cuyahoga County, "for entry."

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 807.

GIANT TIGER DRUGS, INC.,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 807.

GIANT TIGER DRUGS, INC.,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL.

A. MOTION.

Appellee, pursuant to Rule 16(b) of the Revised Rules of this Court, moves that this appeal be dismissed on the ground that said appeal does not present a substantial federal question of sufficient importance and substance to warrant further consideration and argument of this case.

B. STATEMENT OF THE CASE.

This action is an appeal from the Supreme Court of Ohio, having originated in the Municipal Court of Euclid, Ohio.

On September 14, 1959, a warrant was sworn to and subsequently an arrest made of Giant Tiger Drugs, Inc., the appellant, charging that on the 6th day of September, 1959, being the first day of the week, commonly called Sunday, it did unlawfully suffer or permit a building located at 22480 Shore Center Drive, Euclid, Ohio, to be opened for the transaction of business in violation of Section 3773.24 of the Revised Code of Ohio.

The appellant was tried, found guilty and fined $25.00 and costs by the Municipal Court of Euclid, Ohio. The conviction was affirmed by the Court of Appeals for the County of Cuyahoga, State of Ohio, in an unreported decision without opinion. The Supreme Court of Ohio dismissed an appeal from the decision of the Court of Appeals of Cuyahoga County, Ohio, for the reason that no debatable constitutional question was involved. The decision is reported in Ohio State Reports, Volume 171, at page 294.

C. STATUTE INVOLVED.

Appellant sets forth, commencing at page 2 of the Jurisdictional Statement, Ohio Revised Code Section 3773.24 which is invloved in this action.

Ohio Revised Code Section 3773.24 is not ambiguous, unreasonable, arbitrary and discriminatory in classifications.

A classification of business which is reasonable for the purpose of legislation is not unconstitutional. (See 50 *Am. Jur.* 810, Sundays and Holidays.)

> Section 11 *Classification of Businesses*--The equal protection clause of the Federal Constitution, while prohibiting class legislation, does not prohibit reasonable classification of persons and things for the purpose of legislation and, hence, a state may, so far as the Federal Constitution is concerned, classify business and objects for purpose of legislation, provided the classification is not arbitrary but is reasonable for the purpose of the legislation and based upon proper and justifiable distinctions concerning the purpose of the law. Accordingly, in enacting statutes or ordinances requiring observances of Sundays, the legislative body is vested with discretion to determining the kinds of pursuits, occupation or business to be included or excluded, and its determination will not

be interfered with by the courts, provided the classifications and discriminations made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare and safety. The fact that there are occupations other than those affected which the Legislature might, with equal propriety, have included, is not a valid objection to the law."

Appellant claims that by the various exceptions the Ohio Legislature has passed a law which constitutes class legislation, is discriminatory and is incapable of clear construction.

Only a cursory examination of the statute is required to find that it has always prohibited all "common labor" and "transaction of business" with the exception of work of necessity or charity, although the statute specified it did not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, toll gates or ferries from attending them on Sunday.

We find no unreasonableness in extending the exclusion of a few modes of traveling to encompass all traveling. This latter can be supported on two grounds. First, traveling is one of our national pastimes. Likewise, it would be vain to attempt to allow persons freedom for recreation, sports, and amusements, without assuring them they would be free to travel to and from such activities. Second, our national economy necessarily rests upon transportation, whether by rail, motor vehicle or airplane, so that while it may not be necessary to buy milk and other fresh foods on Sunday, it is necessary that they be moved to market over the weekends so as to have them available during the week. Clearly, the exemption for traveling, under paragraph (A), is a reasonable classification.

Under paragraph (B), the Sunday enjoyment of other activities, more generally accepted as being recreation, sport or amusement, is exempt and is clearly a reasonable classification.

The exemption of "fairs" under paragraph (C) of the statute and under (D) of publicly owned places of entertainment, recreation or education could really have been, by ordinary rules of statutory construction, encompassed under paragraph (B) as amusements, etc. That the Legislature saw fit to specify exceptions (C) and (D) does not constitute class legislation.

Even if we take a narrow view that the State has specifically exempted only "fairs" and the "operation of publicly owned places of entertainment, recreation or education" (without considering whether or not these activities would already be exempted under paragraph (B) as general recreation, etc.), it is clear that a state can reasonably create classifications of fairs or the operation of a publicly owned place of entertainment. We are familiar enough with what constitutes a "fair" to agree that a fair may be permitted on Sunday without doing violence to the purpose of Sunday closing legislation. Similarly, the operation of recreational activity carried on in publicly owned places of entertainment—which necessarily assumes at least the right of supervision by the public body which owns the sites—does no violence to the purpose of Sunday closing laws. (See 50 *Am. Jur.* 811, *infra* p. 6.)

Certainly there is a relation between health, safety and morals and the exceptions allowed for traveling, recreation, fairs and publicly owned places of entertainment, recreation or education.

In our present mode of living "rest from ordinary activities" does not necessarily mean, as it did long ago, that we cease all activity on Sunday except church-going. Today's American is ofttimes more energetic physically in

his recreation than in his daily labors. The Legislature has wisely decreed that exceptions be allowed for these salutary activities. It would seem that appellant's complaint is not really grounded so much on the fact that the statute has been liberalized, but rather in that it was not liberalized so as to exempt appellant. By no stretch of the imagination, however, is the amendment of such a material nature as to render invalid a statute previously adjudicated to be constitutional.

In any event, the classification under Ohio Revised Code Section 3773.24 is more than adequate to meet the constitutional requirement.

> "Due process of law permits the sovereign to legislate to affect a single individual by name, a class by description, or to embrace the entire populations, the only requirement being that there be some reasonable basis, and that the law shall operate equally. Nor is there any constitutional requirement that the object of legislation shall relate to all the people." (10 *O. Jur.* 2d, 434.)

The Supreme Court of the United States rejected the same questions that are involved in the instant case when, on December 8, 1958, it made an entry in the case of *Kidd, et al. v. State of Ohio*, 358 U. S. 131, dismissing same for want of a substantial federal question. The *Kidd* case had been appealed to this Court from the Ohio Supreme Court and involved the same questions. The Ohio Supreme Court held that the Sunday closing law was not vulnerable to the attack that it is a measure for the enforcement or promulgation of religious observances, and further held that so long as those classifications are not arbitrary, capricious or unreasonable, and do not discriminate among the same classes of pursuit, they are valid. *State of Ohio v. Kidd, et al.*, 153 N. E. (2d) 413, 167 O. S. 521.

We have previously in this brief referred to the rule that the equal protection clause does not prohibit reason-

able classification of persons and things for the purpose of legislation by quotation from 50 *Am. Jur.* 810, Sundays and Holidays, Section 11, Classification of Business (*supra*, pp. 2-3). To exemplify the pitfalls inherent in a statute which attempts to enumerate either the businesses which are subject to Sunday closing laws or those which are exempted therefrom, we invite the Court's attention to the text immediately following that which we previously quoted.

> "But the courts will not sustain a statute or ordinance which prohibits the exercise of certain businesses or occupations, legitimate and lawful within themselves, which do not carry inherent reasons for such discrimination, where there is no prohibition placed upon other similar occupations. And while in the majority of the older cases statutes which prohibited the following of certain occupations only, or, after general prohibitory provisions, excepted certain occupations and callings from the operation of the statute, have been sustained, the tendency of the more recent cases is to hold such statute invalid as being discriminatory or constituting class legislation." 50 *Am. Jur.* 811.

The text illustrates this aspect of the rule by an analysis of laws aimed specifically at barbering:

> "According to many decisions, legislation which singles out the business of barbering and forbids its exercise on Sunday is invalid upon the ground of unjust discrimination and class legislation, although in a majority of the cases, laws prohibiting barbering have been sustained against the contention that they are class legislation or operate to deprive one of his property without due process of law." *ibid.*

The text also points out that the legislature may validly discriminate between different forms of amusement or entertainment:

"The legislature may recognize different degrees of evil tendency in different forms of amusement or entertainment and may give effect thereto in Sunday laws without being open to the charge that the legislation is arbitrary and unwarranted, but the statutes must apply to the entire class which they purport to affect. The validity of a statute prohibiting the operation of dance halls on Sunday, excepting from the operation thereof dance halls or pavilions maintained or conducted in public playgrounds or in parks where no admission was charged, and where good order was maintained and no intoxicating liquor sold, has been sustained." *ibid.*

Ohio Revised Code Section 3773.24 meets the test of generality both as to inclusion and exclusion, and likewise meets the test of reasonableness. The newly added exemptions are just as susceptible of interpretation by the courts as the retained exemptions of "works of charity or necessity." The "general language" of the statute does not make it "vague." If the legislature had attempted to make it specific as appellant infers it should have, by prohibiting or excepting certain occupations only, it would in all probability be invalid. No legislature, however wise, could prepare such an enumeration without overlooking some activity which would result in discrimination.

Ohio Revised Code Section 3773.24 does not violate the clauses of the first amendment prohibiting an establishment of religion and guaranteeing its free exercise, and does not violate the equal protection clause of the fourteenth amendment.

Appellant argues that Ohio Revised Code Section 3773.24 is unconstitutional because it is a law for the promulgation of religious beliefs. True, that section by its term is not applicable to "persons who conscientiously

observe the seventh day of the week as the Sabbath and *abstain thereon from doing things prohibited on Sunday.*" However, the evidence in this case under consideration does not disclose that the appellant's place of business involved closed on any day of the week in the observance of a religious belief, or for any other reason, and, therefore, the appellant is hardly in a position to attack the statute on the constitutional grounds asserted. *Humphrey Chevrolet, Inc. v. City of Evanston*, 7 Ill. (2d) 402, 131 N. E. (2d) 70; *State v. Grabinski*, 33 Wash. (2d) 603, 206 P. (2d) 1022.

Sunday closing laws have generally been upheld as constitutional and valid against a variety of attacks, such as, they constitute class legislation, they are too uncertain, they violate the constitutional rights of citizens as to equal privileges and immunities, they violate the right of life, liberty or the pursuit of happiness, and they violate the constitutional right of freedom of religion. 50 *Am. Jur.* 803, Section 5; 83 *Corpus Juris Secundum* 800, Sunday, Section 3.

The question whether designating Sunday as the "day of rest" is a violation of the freedom of religion guaranteed by the Constitution was discussed in the case of *State v. Ullmer*, 143 N. E. (2d) 849, 105 O. App. 546; affirmed 150 N. E. (2d) 413, 167 O. S. 541, appeal dismissed 358 U. S. 131. Paraphrasing the court's decision, it was held:

> "In choosing Sunday, one cannot argue it is in furtherance of religion. The statute requires nothing, imposes nothing, dictates nothing. It leaves man completely free to choose his religion and to practice it without let or hindrance. * * * In passing legislation, it is proper to consider ease or difficulty of enforcement. It is easier to enforce a day which a large group

of people already observe than let individuals pick their own days. The selection of this day, Sunday, doesn't interfere with any one religion."

Appellant has discussed the recent ruling made by the Federal District Court in Massachusetts in the case of *Crown Kosher Supermarket of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), to which the United States Supreme Court granted a right to appeal said decision.

It should be noted that the "Lord's Day" statute of the Commonwealth of Massachusetts does not contain the same type of exceptions which were written into the Ohio statute. Under the language of the Massachusetts statute, the sale of "Kosher Meat" was only permitted from 6 o'clock A. M. to 10 o'clock A. M. on Sundays. It was this particular restriction which the Federal District Court found to be an unreasonable one imposed upon those who observed a day other than Sunday as a day of rest.

There is no such limitation in Ohio statute on the right to transact business for those who * * * "conscientiously observe the seventh day of the week (Saturday) as the Sabbath and abstain thereon from doing things prohibited on Sunday."

D. CONCLUSION.

Wherefore, in view of the foregoing, appellee respectfully contends that this appeal should be dismissed, as no substantial constitutional questions are presented.

Respectfully submitted,

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